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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~763~~ 60

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Pennsylvania Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on February 26, 1952 (R. 64-65).

Opinions Below

The opinion and the dissenting opinion of the United States Court of Appeals for the Second Circuit reversing the judgment of the United States District Court for the

Eastern District of New York are reported in 194 F. 2d 612, 613, 615, and appear in the record at pages 59-62 and 63-64. The opinion of the United States District Court dismissing the complaint is reported in 99 F. Supp. 506, and appears in the record on pages 44-49.

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 26, 1952 (R. 64-65). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28 United States Code, Section 1254.

Questions Presented

The principal questions raised by the holding of the Court of Appeals are as follows:

1. Whether the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, was applicable and afforded an exclusive remedy for respondent's injury; or

2. Whether the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. §§ 51 *et seq.*, or the Safety Appliance Act, 27 Stat. 531, 45 U. S. C. §§ 1 *et seq.*, could properly be invoked for respondent's injury.

Respondent was injured on a car float of more than eighteen tons, owned and operated by the petitioning railroad company. The float was a vessel used in the transportation of railroad cars across the river to a pier at Harsimus Cove at Jersey City, New Jersey, and at the time of the injury was lying there in navigable waters (R. 39-40, 42-43). Respondent, while "engaged in defendant's

business of interstate commerce" (R. 4), was performing his regularly assigned duties as a member of a drill crew (R. 14) unloading freight cars from a car float and making them up into trains (R. 13). While on one of the freight cars releasing the hand brakes for its removal from the car float, he was knocked or fell from the car, striking the platform of the car float and thereby sustaining an injury, as is more fully set forth in the Statement below.

Statutes Involved

The statutes here involved are the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424; as amended, 33 U. S. C. §§ 901 *et seq.*, hereinafter sometimes referred to as the "Compensation Act"; Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. §§ 51 *et seq.*, and Safety Appliance Act, 27 Stat. 531, 45 U. S. C. §§ 1 *et seq.*; and the pertinent provisions thereof are set forth in the Appendix (*infra*, p. 19).

Statement

When this case appeared on the trial calendar of the United States District Court for the Eastern District of New York, both counsel called the attention of the judge, Hon. Harold M. Kennedy, to the fact that the pleadings raised a serious question whether the Federal Employers' Liability Act or the Safety Appliance Act (upon which statutes respondent's claim was based) could properly be invoked by respondent, even if petitioner's negligence were proved, or an unsafe appliance caused respondent's injuries (R. 44), or whether his remedy was exclusively under the Longshoremen's and Harbor Workers' Compensation Act as alleged in the answer (R. 7, 8). Hav-

ing ascertained that there was no factual dispute concerning the nature of respondent's employment when injured or the place of the occurrence of the accident, the learned judge suggested a preliminary determination of the proper remedy (R. 44). Thereupon counsel for petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12(b)(6), 56(b) and 56(d), supporting his motion with an affidavit (R. 37, 39, 44). In an affidavit in opposition, counsel for respondent made specific admissions and concessions essential to such determination (R. 42-43).

The conceded facts are as follows: Respondent was employed by petitioner, The Pennsylvania Railroad Company, at its Harsimus Cove Yards, Jersey City, New Jersey (R. 39). As a part of his duties, he was required to assist in the placing of freight cars on, or removing them from, car floats owned and operated by petitioner (R. 40, 43), and in which they had been, or were to be, transported by petitioner across the Hudson River, to or from Harsimus Cove (R. 13), where the car floats were moored in and upon navigable waters of the United States (R. 40, 42-43). Respondent was a regular member of the drill crew (R. 14) which was so engaged in the placing on or removal of the freight cars from the car floats (R. 43) and in making them up into trains (R. 14), and also in making up other trains from cars on shore. His drill crew generally consisted of himself and an engineer, a fireman, a conductor and another brakeman. In the general course of their business, they would go down to the water with an engine and pusher, something like a flat car, and the pusher would be backed by the engine on to the car float and coupled up with the lead freight car (R. 15), sometimes by the other brakeman and sometimes by himself (R. 13); the hand brakes would be released and the freight cars, which were coupled together, drawn from the car floats (R. 21-27). Respondent's particular

job in this respect was generally to release the hand brakes on the freight cars. Sometimes he would "pull the pin or couple up." It would depend upon what he "wanted to work on" (R. 13).

On the occasion of the accident this customary procedure was followed. After having taken off cars from three or four other floats (R. 14), the pusher was backed by the engine on to a car float with two tracks and coupled up with the lead freight car on the north side. Respondent climbed from the pusher on to the platform of the car float and thence on to the freight box cars to release the hand brakes. After having thus released the hand brakes on several box cars, he came to the car in question on the south side, succeeded in releasing the hand brake by which, as he claims, he was thrown off balance and fell from the box car on to and striking the platform of the float, suffering the injury which is the basis of this law suit (R. 21-27, 40).

Since the accident and after some hospitalization, respondent has been working as a freight brakeman at Pennsylvania Station, New York, with the same rate of pay (R. 29-30).

Respondent alleges in the complaint that at the time of the accident he "was engaged in the defendant's business of interstate commerce" (R. 4). In addition to the above concessions, respondent stipulated that the accident occurred on navigable waters of the United States (R. 42-43); that petitioner had complied with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended; that the car float on which the accident occurred was a vessel weighing more than eighteen tons; that he was not a master or member of the ship's crew within the meaning of the Compensation Act and did not fall within its other exceptions; and finally that petitioner made or offered to make payments to him pursuant

to and in compliance with the provisions of the said Act (R. 39-40, 42-43).*

Upon the admissions and concessions by and on behalf of respondent (R. 44-45), Judge Kennedy granted the motion to dismiss the complaint with an opinion (R. 44-49) that respondent's exclusive remedy was under the said Compensation Act, and judgment was entered thereon (R. 52). As heretofore stated, the United States Court of Appeals for the Second Circuit reversed, with an opinion by District Judge Brennan (R. 59 *et seq.*) and by Circuit Judge Clark dissenting (R. 63 *et seq.*).

Specification of Errors to be Urged

The Court of Appeals for the Second Circuit erred:

(1) In reversing the order and judgment of the District Court, which dismissed the complaint on the ground that the Longshoremen's and Harbor Workers' Compensation Act was applicable and afforded respondent an exclusive remedy.

(2) In holding that the Longshoremen's and Harbor Workers' Compensation Act was not applicable.

(3) In holding that the Longshoremen's and Harbor Workers' Compensation Act did not afford respondent an exclusive remedy for his injury.

(4) In holding that the Federal Employers' Liability Act and the Safety Appliance Act were applicable and afforded a remedy for respondent's injury.

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* The limitation of time for filing claims under the Compensation Act does not begin to run until the determination of this suit. Section 13(d), 44 Stat. 1432, 33 U.S.C. § 913(d).

Reasons for Granting the Writ

I.

The Court of Appeals has decided important questions of Federal law which have not been, according to the majority opinion, but should be, settled by this Court.

It is of the utmost importance that the employer and employee should know what remedy is available for such an injury sustained by a railroad employee who, as a part of his regular duty, was assisting in the unloading of a car float. It is particularly important to the employee lest, while pursuing the wrong, he may lose the benefit of the right remedy. This was recognized by the attorney for the respondent who cooperated with counsel for petitioner and the court in presenting the question for early determination (R. 42-43). The desirability has also been recognized by this Court. *Davis* v. *Department of Labor*, 317 U. S. 249, 254-255.

It is respectfully submitted that the questions should be determined by this Court at this time. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3. Whatever the result of a trial on the merits may be, the question of the proper remedy must be decided. If, upon the trial, respondent should be unable to prove fault on the part of the employer or a defect in the appliance, he will desire relief under the Compensation Act, providing for compensation without fault, which must be denied him unless the decision of the Court of Appeals is reversed. If, on the other hand, respondent should obtain a judgment under the Federal Employers' Liability Act, it would be rendered ineffective if petitioner's position should then be sustained.

Circuit Judge Clark (R. 63-64) and District Judge Kennedy (R. 47-49) thought it had been settled that a railroad employee injured while engaged on a vessel in navigable waters, as in this case, as a part of his required duties in loading upon or unloading from the vessel freight cars moving in interstate commerce, was entitled to the exclusive benefits of the Compensation Act. It is unimportant whether such duties were on full time or on part time. A car float in navigable waters is subject to the maritime law like any other vessel. See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 134. A railroad transporting its freight cars across navigable waters is engaged in maritime activity. Its employee assisting in unloading a car float is employed in maritime service.

It was generally thought that a definite guide had been established for railroad employers and employees, see *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.); with one case to the contrary, *Zientek* v. *Reading Co.*, 93 F. Supp. 875 (E. D. Pa.), and that resting upon a reason disavowed by the majority opinion here (R. 62, 64).

But now, notwithstanding the large number of railroad employees in all parts of the country who have, for full or part time, assigned to them duties of placing on and removing freight cars from ferries and car floats, the employers and employees are left with no standard to guide them. If the railroad employee is loading or unloading freight from a freight car on the car float, the Compensation Act is applicable and is his exclusive remedy, *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; but if he is assisting in unloading a car float by releasing the hand brakes to remove the freight cars, he is not entitled to such

protection, according to the majority opinion (R. 59 *et seq.*), if his maritime duties are on part time (but see 44 Stat. 1425, 33 U. S. C. § 902(4)). As Circuit Judge Clark states (R. 63):

> "The decision here rejects traditional tests to rely upon something found in the nature of the employer's job, a distinction so vagrant and fleeting that it apparently cannot be stated more precisely than something 'distinctively a railroader's job.' or a 'specialized railroad employment,' requiring particular training and with particular risks. But how that can be given anything like finite application to distinguish between a 'freight handler' manipulating freight, and a 'railroader' manipulating brakes, on a car float, I am unable to perceive."

And referring to the above cases, *supra*, p. 8, he further states (R. 64):

> "These cases seem to me to show as clear a line of demarcation as we can reasonably expect in the difficult realms of jurisdiction so important and apparently so necessary to our federated organization of government. But now we give these up for what seems to me a chartless morass."

The employee is entitled to know with reasonable certainty what remedy to pursue. The railroads of the country should know whether they are compelled to provide for compensation without fault in such cases or only for negligence or failure to provide safety appliances.

It is important that these questions be settled by this Court.

II.

There is now a sharp conflict in judicial opinion, whether, on the facts of this case, the employee's remedy is under the Longshoremen's and Harbor Workers' Compensation Act or the Federal Employers' Liability Act and the Safety Appliance Act, which ought to be resolved by this Court.

The decision of the United States Court of Appeals for the Second Circuit, with Clark, J. dissenting, is in direct conflict with the decision of the Circut Court of Appeals for the Ninth Circuit in *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638, in which it was held that the Compensation Act provided an exclusive remedy for a railroad brakeman injured in releasing the brakes of a freight car on a car ferry in navigable waters of the United States. As stated by Circuit Judge Clark in approving the opinion of the District Court "An exact precedent is found in *Buren* v. *Southern Pac. Co.*, 9 Cir., 50 F. 2d 407, where the Supreme Court denied certiorari . . . ."

Other decisions, involving railroad employees injured on navigable waters, in sharp conflict with the decision of the Court of Appeals in the instant case are: *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; and *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.).

It is important that this diversity of opinion be resolved by this Court.

III.

The Court of Appeals has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

Circuit Judge Clark in his dissenting opinion, speaking of the decision of this Court in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, says: "To me the *Nogueira* case seems wholly controlling in both its reasoning and its holding" (R. 63). In the *Nogueira* case, likewise brought in the District Court under the Federal Employers' Liability Act, the judgment dismissing the complaint upon the ground that the Longshoremen's and Harbor Workers' Compensation Act was applicable and afforded an exclusive remedy, was affirmed by the Circuit Court of Appeals and by this Court. In that case, the employee was injured when thrown to the floor of a car float belonging to the defendant railroad company. The float was used in transporting cars and at the time of the injury was lying in navigable waters at a pier in New York Harbor. The injured employee was one of a gang of freight handlers loading freight into a railroad car. His duties were not, as assumed in the opinion of Judge Brennan (R. 614), of the nature of the traditionally maritime longshoreman or stevedore. He was not stowing cargo in the hold of a vessel and thus involving "the safety of the ship itself" as in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62. His duties were maritime, not because loading freight into a railroad car is inherently maritime, but because loading it into a car on a car float is an essential part of the transportation by water. There is obviously no distinction between loading freight into a railroad car on a float and placing a freight car on the float, in so far as participation in commerce by water is concerned. Each is

a service necessary to enable the car float to perform its maritime function. Clearly there is no distinction between loading and unloading in that respect.

In rendering the decision of this Court in the *Nogueira* case, the Chief Justice said (pp. 133-4):

> "The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters.
>
> "From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel."

The Chief Justice further said (p. 134):

> "No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation."

Conclusion

In reversing the decision of the court below, the Court of Appeals decided an important question of Federal law which has not been, according to the majority opinion, but should be, resolved by this Court. Furthermore, the decision of the Court of Appeals has resulted in a sharp divergence of judicial opinion with respect to the application of the Longshoremen's and Harbor Workers' Compensation Act. As to the applicable principles, the Court of Appeals for the Second Circuit differed with the Court

of Appeals for the Ninth Circuit in *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638. The decision of the Court of Appeals is probably in conflict with the decision of this Court in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. For the reasons heretofore stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

New York, N. Y., May 10, 1952.

IN THE

Supreme Court of the United States

October Term, 1951

No. .....

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinions below, the statement as to jurisdiction, the statement of the case, and the specification of errors to be urged are set forth in the petition at pages 1, 2, 3, and 6, respectively, and are not repeated here.

ARGUMENT

The conflict in decisions, with respect to the large number of railroad employees throughout the country engaged in placing on and removing freight cars from car floats and car ferries lying in navigable waters, should be resolved by this Court and the status of such employees determined.

Respondent's case falls within the ambit of the decision in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. In that case, plaintiff was not a stevedore skilled in the art

of stowing cargo in the hold of a ship. He was not a longshoreman loading cargo into a ship. He was a railroad employee loading freight into a railroad car on a car float. He was a railroad freight handler assisting in the movement of goods by water in interstate commerce.

In the performance of his assigned duties, respondent was also engaged in interstate transportation and commerce. He too was on a vessel in navigable waters. He set the brakes in stopping the movement of the freight cars and released the brakes in starting them. He was engaged in the performance of the latter act at the moment of injury. He was assisting in unloading the cars from the float. He was performing acts in transportation by water. These required duties were exclusively of a maritime nature. His last training and position had been that of a stevedore (R. 11).

Until the decision of the Court of Appeals, it was generally thought to be settled that railroad employees engaged in loading into or removing cargo from vessels or placing on or removing freight cars from car floats or car ferries, lying in navigable waters, were covered by the Compensation Act. *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.).

Until the decision herein sought to be reviewed, there was believed to be certainty in the remedy of railroad employees so engaged and in the liability of the employers. Such employees were to receive compensation regardless of fault. They were not to fall in the doubtful zone of employees not engaged in interstate transportation or commerce and whose occasional activities create borderline problems to be determined case by case. *Davis* v. *Depart-*

ment of Labor, 317 U. S. 249; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469.

Now uncertainty has been substituted for certainty; indefiniteness for definiteness; insecurity for security (R. 63-64). Moreover, the decision involves a large class of employees throughout the country having similar or substantially identical duties, furnishing an unusual opportunity to provide a workable standard for employers and employees. They should be informed whether there is to be compensation irrespective of fault or recompense only upon proof of negligence or unsafe equipment.

The objection that their activities are part time only was answered in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 247, in which this court overruled such an objection stating:

> "Moreover, § 2(4) of the Act expressly provides for its application to 'employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States.'"

The Court of Appeals found in that case that the janitor or porter, whose work was predominantly non-maritime, was not shown to have been theretofore sent by the company on to a boat on the navigable river (116 F. 2d 789, 791). Nevertheless the single occasion provided the essential "maritime activity."

The petitioning railroad company, operating car floats in navigable waters in transportation between the states, is clearly an employer within the meaning of Section 2(4) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, see Appendix, *infra*, p. 19. The employee does not fall within the exceptions of subdivision (3) of said section since he was not a master, nor a member of the ship's crew, nor unloading a vessel under eighteen tons

(R. 39-40, 42-43). He was performing the service of transportation on water. He was accordingly covered by Section 3 (33 U. S. C. § 903) and the remedy was made exclusive by Section 5 (33 U. S. C. § 905). No exception is made of the employees of a railroad company in maritime service on navigable waters or with respect to the question whether such employment was in connection with an extension of railroad service. *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128.

As reported to and first passed by the Senate, the bill contained a provision in Section 3 excepting "an employee of a common carrier by railroad engaged in interstate or foreign commerce . . . if the injury from which the disability or death results occurred while the employee was employed in such commerce." Senate Report No. 973, 69th Congress, First Session; see also *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 136. This exception was eliminated from the bill as finally passed. Until Congress writes that exception into the Act, respondent and other such employees are within its exclusive coverage. Section 5 (33 U. S. C. § 905). It was suggested that the said exception, eliminated by Congress, was in effect re-enacted by the 1939 amendment to the Federal Employers' Liability Act (53 Stat. 1404, 45 U. S. C. §§ 51 *et seq.*) (*Zientek* v. *Reading Co.*, 93 F. Supp. 875; (E. D. Pa.)), but that argument was abandoned in the Court of Appeals and disavowed by that court (R. 62, 64). See also *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 189-190; *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.).

Since the decisions in different circuits have been brought into conflict, the status of the employees unsettled, and the Court of Appeals has probably failed to follow the controlling decision of this Court, the petition should be granted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

New York, N. Y., May 10, 1952.

Appendix

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, are the following:

"§ 902. *Definitions.* When used in this chapter—

. . . . .

(3) The term 'employee' does not include a master or a member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.) . . . ."

"§ 903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . . ."

"§ 904. *Liability for compensation.* (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case

of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

"§ 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."